Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

No. 03-1425

In the Supreme Court of the United States

MARVIN L. BARMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly invoked the fugitive disentitlement doctrine to dismiss petitioner's interlocutory appeal from the district court's denial of his motions to dismiss the indictment and to suppress evidence, where petitioner has deliberately remained outside the United States after indictment and refused to submit himself to the jurisdiction of the district court.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. B1-B2) summarily dismissing petitioner's appeal is unreported. The orders of the district court denying petitioner's motions to dismiss the indictment and to suppress evidence are unreported.

JURISDICTION

The court of appeals entered its judgment on October 21, 2003. A petition for rehearing was denied on January 8, 2004 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury sitting in the Western District of Pennsylvania charged petitioner with conspiracy to sell drug paraphernalia, in violation of 18 U.S.C. 371, selling drug paraphernalia, in violation of 21 U.S.C. 863, and using the Internet to facilitate those crimes, in violation of 21 U.S.C. 843(b). Petitioner, who left for the Bahamas one month before the indictment issued, has remained in the Bahamas and has not submitted himself to the criminal jurisdiction of the district court. He nevertheless has filed numerous motions to dismiss the indictment and to suppress evidence. The district court dismissed the motions under the fugitive disentitlement doctrine. See generally *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam). The court of appeals dismissed petitioner's interlocutory appeal under the same doctrine. Pet. App. B1-B2.

Petitioner and his wife operated one of the most lucrative drug paraphernalia businesses in the United States. Petitioner manufactured and distributed, among other things, marijuana pipes, bongs, crack pipes, cocaine grinder kits, and baggies. He also operated two drug-related websites from the United States and owned manufacturing facilities and a warehouse in Indiana. His business generated millions of dollars in annual profits, most of which was deposited in bank accounts in the Bahamas. Gov't C.A. Answer to Pet. for Reh'g (Gov't Answer) at 1-2. In August 2001, federal agents executed search warrants at petitioner's business facilities and his Indiana residence. Petitioner was present at the time of the search. The search uncovered twelve tractor-trailer loads of drug paraphernalia and related materials. *Id.* at 2-3.

On May 6, 2003, a federal grand jury returned a sealed five-count indictment charging petitioner and his wife with conspiracy to sell drug paraphernalia, in violation of 18 U.S.C. 371, selling and offering for sale drug paraphernalia, in violation of 21 U.S.C. 863, and use of the Internet to facilitate those crimes, in violation of 21 U.S.C. 843(b). Gov't Answer at 3. Petitioner had left for the Bahamas one month before the indictment issued. While petitioner's wife returned to the United States one week after the indictment was handed down and was arrested, petitioner canceled his own return flight to the United States and has remained outside the jurisdiction of the United States. *Ibid.*

Notwithstanding his refusal to submit to the criminal jurisdiction of the district court, petitioner filed seven motions to dismiss the indictment and four motions to suppress evidence. Based on the fugitive disentitlement doctrine, the district court denied all of the motions. Gov't Answer at 4.

The court of appeals summarily dismissed the appeal "pursuant to the doctrine of fugitive disentitlement." Pet. App. B1-B2 (citing *Molinaro*, *supra*, and *United States* v. *Wright*, 902 F.2d 241 (3d Cir. 1990)).

ARGUMENT

Petitioner seeks this Court's review of the court of appeals' dismissal of his appeal under the fugitive disentitlement doctrine. That claim does not warrant further review both because the court of appeals was required to dismiss the appeal for lack of jurisdiction and because, in any event, the court's application of the fugitive disentitlement doctrine is consistent with the decisions of this Court and every court of appeals to address the question.

1. The court of appeals lacked jurisdiction over petitioner's interlocutory appeal of the district court's denial of his motions to dismiss the indictment and to suppress evidence. The absence of jurisdiction in the court of appeals prevents this Court from addressing the merits of the question presented. As a general rule, the court of appeals' jurisdiction is confined to the review of "final decisions" of the district courts. 28 U.S.C. 1291. That "insistence on finality and prohibition of piecemeal review discourage[s] undue litigiousness and leaden-footed administration of justice, [which is] particularly damaging to the conduct of criminal cases." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)).

The denial of a motion to dismiss an indictment or to suppress evidence without prejudice is not a final judgment, and thus is not subject to review under 28 U.S.C. 1291. See *United States* v. *MacDonald*, 435 U.S. 850, 852 (1978) ("[T]he denial of a pretrial motion in a criminal case generally is not appealable."). Furthermore, petitioner has made no showing that the district court's denial of his motions to dismiss the indictment and to suppress evidence falls within that "small class" of cases for which interlocutory appeal is permitted under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The district court's denial of his motions without prejudice did not "conclusively determine the disputed question[s]"; petitioner's motions are not "completely separate from the merits of the action"; and his claims will not be "effectively unreviewable on appeal from final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Rather, the court's orders sustaining the indictment and denying the motions to suppress are matters that

will "merge" into any final criminal judgment, *Federal Trade Comm'n* v. *Standard Oil Co.*, 449 U.S. 232, 246 (1980), and are subject to review as a matter of appellate jurisdiction at that time, *Hollywood Motor Car Co.*, 458 U.S. at 267-270. Accordingly, the court of appeals lacked jurisdiction to adjudicate the merits of petitioner's challenges to the district court's orders.

"Without jurisdiction the court cannot proceed *at all* in any cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) (emphasis added); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (same). Accordingly, when a lower federal court lacks jurisdiction, this Court has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997) (quoting *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). The absence of jurisdiction in the court of appeals thus would preclude this Court's consideration of the question presented.

2. Petitioner's challenge (Pet. 9-23) to the court of appeals' application of the fugitive disentitlement doctrine does not merit this Court's review, in any event.

When petitioner left the United States, he was well aware of the criminal investigation pending against him. His home and business had been searched, his property had been seized, his websites had been closed down, and a forfeiture action had been commenced against him. Gov't Answer at 7. Petitioner did not return from the Bahamas when he learned of the indictment, when his wife was arrested, when she sat in prison for nearly five months awaiting trial, or when she pleaded guilty. *Id.* at 7-8. Rather, he remains beyond the reach of the district court's processes, even as he seeks to challenge the government's basis for

prosecution and the evidence gathered against him. Under those circumstances, and absent any allegation or evidence that petitioner was or is unable to return to the United States, the court of appeals was entitled to conclude that he remained abroad solely to avoid prosecution.

Petitioner argues (Pet. 9-17) that the court of appeals erred in determining that he is a "fugitive" because he did not flee the United States after conviction of a crime or otherwise abscond in violation of United States law. But petitioner is as much a threat to the court of appeals' dignity and as much beyond the reach of its authority as he would have been if he had fled its jurisdiction after being charged, tried, and convicted. As petitioner acknowledges (Pet. 11), the court of appeals' holding that the fugitive disentitlement doctrine extends to an indicted criminal defendant who, while seeking to avail himself of beneficial rulings of the district court in the pending criminal case, deliberately refuses to submit himself to the jurisdiction of that court for purposes of prosecution (Pet. App. B1-B2)—is consistent with the decision of every other court of appeals that has considered the question. See *Schuster* v. *United States*, 765 F.2d 1047, 1050 (11th Cir. 1985) ("Approximately 3 years have passed and she has still not reappeared to avail herself of this country's judicial system insofar as it might hurt her, but she has had no compunction about requesting the resources of this country's courts insofar as they might help her. * * * Accordingly, whatever Schuster's intent may have been when she left the United States, she has certainly since established her status as a fugitive from this nation's

criminal process.").* And that limited appellate precedent on the subject, which it has taken half a century to accumulate, further suggests that the issue does not arise with sufficient frequency to warrant this Court's review.

Contrary to petitioner's argument (Pet. 9-11), the court of appeals' holding is also consistent with the

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* See also *United States* v. *Catino*, 735 F.2d 718, 722 (2d Cir.) (applying doctrine to a defendant who, "having learned of charges while legally outside the jurisdiction, 'constructively flees' by deciding not to return"; "The intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending."), cert. denied, 469 U.S. 855 (1984); *In re Assarsson*, 687 F.2d 1157, 1161-1162 (8th Cir. 1982) ("The district court also found that * * * appellant was a fugitive because he left Sweden with the intent to avoid arrest or prosecution. The district court inferred the requisite intent from proof that appellant knew he was wanted by the authorities (he knew he was under investigation for gross arson and attempted gross fraud, was aware of the travel restrictions and reporting requirements imposed by the Malmo district court, and violated the court order) and failed to submit to arrest.") (internal citations omitted); *id.* at 1162 ("[T]his Circuit follows the absence from the jurisdiction test of fugitive status."); *McGowen* v. *United States*, 105 F.2d 791, 792 (D.C. Cir.) ("To be a fugitive from justice, * * * it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction, and is found within the territory of another."), cert. denied, 308 U.S. 552 (1939); cf. *United States* v. *Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) (per curiam) (for purposes of the fleeing-fugitive exception to the statute of limitations, the "prosecution need only prove that the defendant knew that he was wanted by the police and that he failed to submit to arrest").

decisions of this Court. While most of the Court's cases applying the doctrine have not involved defendants who remained abroad after learning of charges, no opinion of the Court has held that the fugitive disentitlement doctrine does not apply to the type of selective invocation of the court's processes attempted by petitioner here. In *Degen* v. *United States*, 517 U.S. 820 (1996), the Court analyzed the doctrine's application under similar factual circumstances. See *id.* at 822 (Degen moved to Switzerland before indictment and "has not returned to face the criminal charges against him."). The Court ultimately held in *Degen* that the fugitive disentitlement doctrine did not apply to the government's separate *civil* forfeiture action against Degen's property, because the defendant's absence would not delay or frustrate the government's case or its enforcement of the civil judgment, and the district court's broad control over civil discovery could protect against compromise of the criminal proceeding. *Id.* at 825-827. Nothing in that opinion, however, suggested that the doctrine does not apply to individuals who, while refusing to submit to the jurisdiction of the criminal court still seek to compel the *criminal* court to enter unilaterally beneficial rulings in the *criminal* case. To the contrary, *Degen* acknowledged "disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court * * * and expecting them to be honored." *Id.* at 828.

Where, as here, those papers mailed from abroad pertain directly to the criminal proceeding to which the defendant has refused to submit, and seek dismissal of or restrictions on a prosecution that the defendant's voluntary absence has frustrated, the fugitive disentitlement doctrine properly applies. As a matter of

equity and to protect the integrity of the judicial system, criminal defendants should not be allowed to challenge criminal proceedings against them while declining to submit to the judicial system's processes for enforcing the law and remaining outside of the power of the court to enforce its orders. See generally *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-242 (1993) (identifying the purposes of the fugitive disentitlement doctrine).

3. Finally, petitioner's contention (Pet. 17-23) that this Court should review whether the government had "clean hands" in its conduct of the investigation is without merit. Neither the district court nor the court of appeals gave any credence to petitioner's allegations. Even if there were jurisdiction in this Court to entertain those factbound claims, they would not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2004